UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TVT RECORDS and TVT MUSIC, INC.,
Plaintiffs,

v.

THE ISLAND DEF JAM MUSIC GROUP
and LYOR COHEN,
Defendants.

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02 Civ. 6644 (VM)

October 22, 2003

DECISION AND ORDER

Opinion by VICTOR MARRERO, United States District Judge.

Following a bifurcated trial of this action, the jury rendered verdicts of liability and awarded substantial damages in favor of plaintiffs TVT Records and TVT Music, Inc. (collectively "TVT") and against defendant The Island Def Jam Music Group ("IDJ") on TVT's claim of breach of contract, and against IDJ and defendant Lyor Cohen, IDJ's Chairman ("Cohen" and, collectively with IDJ, "Defendants") jointly and severally on TVT's claims of willful copyright infringement, fraud by fraudulent concealment and tortious interference with contractual relations. By Decision and Order dated September 2, 2003, the Court denied Defendants' post-trial motions pursuant to Federal Rule of Civil Proce-

dure 50(b) for a judgment as a matter of law.[1] By a separate Decision and Order issued the same day, the Court granted Defendants' motions pursuant to Rule 59 for a new trial and/or remittitur of the punitive damages award.[2] The Court reserved decision on TVT's motion pursuant to Section 505 of the Copyright Act, *17 U.S.C. § 505*,[3] requesting an amount of, at minimum, $ 2,192,863.20 in attorneys fees and $ 567,460.42 in expenses.[4] TVT subsequently supplemented its motion to include TVT's additional attorneys' fees and expenses totaling $ 494,474.35 that it ascribes to post-trial proceedings in this action. (See Supplemental Declaration of Pamela L. Gurley in Further Support of Plaintiffs' Motion for Attorneys' Fees, dated September 16, 2003, at 2.)

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[1] The Decision and Order concerning the Rule 50(b) motion is reported as *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 366, (S.D.N.Y. 2003)

[2] The Decision and Order concerning the Rule 59 motion (the "Remittitur Decision") is reported as *TVT Records v. The Island Def Jam Music Group*, 279 F. Supp. 2d 413, (S.D.N.Y. 2003).

[3] Section 505 of the Copyright Act provides in pertinent part: "In any civil action under this title, the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

[4] These figures are based on TVT's claimed litigation fees and costs amounting to approximately $ 3.5 million, with 80 percent of that total apportioned to obligations TVT purportedly incurred to advance the prosecution of its copyright infringement claim. (*See* TVT's Memorandum of Law in Support of Its Motion For Attorneys' Fees, dated June 16, 2003, at 1.) TVT also requested an upward adjustment of the attorneys' fees award based on the difficulty of the litigation, in accordance with the factors articulated in *United States Football League v. National Football League*, 887 F.2d 408, 413 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990). (*See id.*) Alternatively, TVT seeks adjustment of the award to a higher amount in the exercise of the Court's inherent power or under 28 U.S.C. § 1927 to reflect Defendants' alleged vexatious litigation. (*See id.*)

In the Remittitur Decision, the Court observed that among the functions of punitive damages, the remedy offers a law enforcement "bounty", serving to create an incentive for plaintiffs injured by extreme misconduct to undertake the risks and burdens of litigation to redress the wrongs. *See TVT*, 279 F. Supp. 2d 413, 425-26 (citing cases). This role is manifested in rules permitting juries to hear evidence of, and to take into account in assessing punitive awards, the extent of attorneys' fees and other litigation costs plaintiffs are forced to incur in order to prosecute defendants' egregious offenses. See id. (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and *Softel, Inc. v. Dragon Med. and Scientific Comm. Ltd.*, 891 F. Supp. 935, 945-46 (S.D.N.Y. 1995)). Implicitly, allowing the jury to weigh such evidence assumes that any penalty assessed may incorporate consideration of plaintiff's attorneys' fees and costs as an element of the recovery it awards. See *Jeffries Avlon, Inc. v. Gallagher*, 149 Misc. 2d 552, 567 N.Y.S.2d 339, 339-40 (N.Y. Supp. 1991) (noting that although legal fees are generally not recoverable, an exception has been carved in some jurisdictions, including New York, "permitting evidence of attorneys' fees to be considered by the fact-finder in determining an award of exemplary or punitive damages in cases where malice has been proved. . . .")

In practice, enabling plaintiffs to offer evidence of litigation costs may serve a dual purpose. The magnitude of the financial burdens the litigation imposes upon the plaintiff may provide to the factfinder instructive circumstantial insight into the full scope of the misconduct and the resources required to bring it to light, as well as some glimpse into the state of mind of the offender concerning issues such as willfulness, bad faith, and other indeces of reprehensibility. Allowing the jury to consider the plaintiff's outlays as a factor in its assessment of punitive relief could also inform the jury's calculation of the penalty fitting for the particular of-

fender and the offense, that is, the damages that would sufficiently punish and deter the wrongdoer's extreme malfeasance by rendering it unprofitable to engage in such misconduct and alerting the defendant of the whole range of the underlying risks entailed, including the prospect of being tacitly taxed in a punitive award for the litigation costs the plaintiff was compelled to expend to prosecute the action.

The Court pointed out, however, that this law enforcement purpose could be problematic in some circumstances, specifically "where the litigation involves multiple claims arising out of the same core event, some based on common law and some on statutory actions that authorize recovery of attorney's fees and costs." *Id.* at n.17. This concern, as the Court noted, derives from the potential for duplicative recovery that may occur in the event a common law punitive damages award includes an amount that encompasses and rewards as an unspecified component of harms suffered, the plaintiff's undifferentiated expenses incurred in prosecuting the entire action, and the plaintiff later separately seeks reimbursement of attorney's fees and costs, especially when such recovery is authorized by an applicable statute. *See id.*

The circumstances described above prevail in this case. The Court, recognizing the unique and extensive burdens that Defendants' intense, at times even excessive, litigation strategies had imposed on TVT, allowed the jury to hear and take into account in assessing punitive damages, evidence of TVT's outlays for attorneys' fees and costs, at that time an amount of approximately $ 3 million. *See id.* at 453-55. TVT prevailed under both its common law and federal copyright infringement claims. The damages assessed in respect of the various claims, however, are lopsided. While the combined awards as regards the common law causes of action totaled $ 23,496,746 in compensatory and $ 108,000,000 in punitive damages, those pertaining to copyright in-

fringement amounted to only $411,275 for compensatory and $300,000 for punitive relief.[5] Thus, while TVT contends that the bulk of its litigation expenses related to pursuing the copyright claims -- by TVT's computation at least 80 percent of its fees and costs -- the reality appears otherwise. The federal claims represent but a fraction of the damages the jury recognized. Similarly, based on the extensive proceedings and the voluminous record in which the Court participated, the Court is not persuaded that TVT's apportionment of its labor and related costs as between the common law and federal statutory claims comports with a fair assessment of the parties' actual litigation efforts.

The Court recognizes that there cannot be a categorical or formulaic correspondence between the damages actually recovered on the federal claims and the amount of attorneys' fees and costs eligible for reimbursement under the statute. Conceivably, the litigation of some complex matters may legitimately demand commitment of resources that in the end may be out of proportion with modest achievement in respect of some claims, while greater results are attained as to other interrelated claims. That eventuality should not by itself serve to bar recovery of the prevailing party's reasonable fees and costs properly incurred in pursuit of the less successful though meritorious claim. *See Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir 1996) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

At the same time, however, the Court does not accept Defendants' contention that not more than five percent of TVT's litigation costs relate to and may be imposed on Defendants by reason of the relatively small recovery and

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[5] With regard to its willful copyright infringement claims, TVT subsequently elected to receive, in lieu of actual damages, profits and punitive damages, the $150,000 statutory damages award determined by the jury. See *TVT*, 279 F. Supp. 2d at 416-17, n.3.

lesser prominence of the infringement claims in relation to the common law causes of action and their more triumphal outcomes. Although TVT's infringement claims generated substantially less litigation activity and recovery, the element of fraud that was integral to each of TVT's common law actions was also a critical aspect of its willful infringement claims. Consequently, significant amounts of the litigation activities and attendant costs required by the copyright actions, and that may appear to have been undertaken here predominantly in pursuit of the common law claims, in fact would have been necessary to support effective litigation of the infringement claims even if the common law actions did not exist. To this extent, the Court considers an apportionment of 50 percent of the litigation costs as more fairly reflecting a proper division of litigation expenses as between TVT's copyright infringement and the common law claims.

Nonetheless, TVT's application for attorneys' fees and costs seeks an award encompassing all expenses relating to its willful infringement claims and supplemental awards for the balance of TVT's litigation costs pertaining to those and/or its other claims. For the purposes of passing upon TVT's instant motion, the Court considers the evidence pertaining to the exceptional difficulties and burdens associated with prosecution of this litigation and reiterates its findings set forth in this regard in the Remittitur Decision. The Court deems these considerations appropriate and sufficient to warrant exercise of its discretion to grant TVT's motion in part for an award of attorney's fees and costs in respect of TVT's infringement claims to the extent recoverable. However, the Court finds insufficient basis to support any fee enhancement under the theories advanced by TVT. First, the Supreme Court has established a strong presumption that the lodestar represents the reasonable fee under the federal fee-shifting statutes and thus has substantially narrowed, if not effectively abolished altogether, the circumstances which justify enhancements. *See Loper v. New York*

City Police Department, 853 F. Supp. 716, 721 (S.D.N.Y. 1994) (concluding that "fee enhancements under the fee-shifting statutes are no longer permissible in this Circuit") (citing *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)).

Second, even insofar as this Court finds adequate grounds to support TVT's recovery of attorneys' fees, it cannot approve such an award with regard to TVT's original application to the extent TVT's punitive award is ultimately sustained in the amount remitted. In reviewing Defendants' motions for remittitur, the Court considered that the extraordinary size of the punitive award, an aggregate of $ 108 million, gave rise to a strong and reasonable inference that the jurors must have fully taken account, in their calculus of the award sufficient to achieve the level of punishment and deterrence of Defendants appropriate in this case, all permissible grounds and elements supported by the evidence they heard, including TVT's litigation expenses.

The Court's ruling on Defendants' remittitur motions reduced the jury's punitive damages award to an aggregate of $ 29,125,000, which TVT elected to accept in lieu of a new trial. Whether or not TVT's litigation costs entered into the jury's damages verdict, in determining the remitted award the Court itself considered the adjusted amount to constitute the penalty sufficient to achieve fully the relevant functions of punitive damages under the totality of the circumstances evidenced here. To this end, the Court specifically weighed in the mix both the appropriate punishment of Defendants' misconduct and its deterrence in the future, as well as recognition of the law enforcement incentive that is embodied in punitive damages awards as described above. The Court also weighed that in this case the jury assessed a substantial compensatory award essentially redressing the entire amount of the losses TVT claimed, and that, as elaborated in the Remittitur Decision, under some circumstances a compensatory damages award that essentially makes the

victim whole serves a punitive function as well. *See TVT*, 279 F. Supp.2d at 424-25 (citing *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1525, 155 L. Ed. 2d 585 (2003)).

Accordingly, the Court concludes that granting TVT's separate application for attorneys' fees and costs would represent a duplication of recovery to the extent the request relates to factors that were already recognized and presumably reflected, even if not explicitly articulated as such, in the jury's punitive damages awards, even as remitted. Had the punitive awards assessed far less, for example, in proportions nearer to or less than the amount of TVT's total litigation expenses admitted in evidence, the Court's supposition concerning the probable reflection of these costs in the verdict would not be warranted. In that event, a more compelling basis might exist to support a separate award to TVT for attorneys' fees and costs.[6]

With respect to TVT's supplemental application for post-trial litigation expenses, however, the amounts requested were not before the Court and jury at the time the verdict was rendered, and thus could not have figured as a

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[6]The Court is mindful that in the realm of possibilities it is conceivable that on appeal of this Court's punitive damages ruling the Circuit Court, even if it were to affirm the legal basis supporting an award, might find grounds upon which to direct a further reduction of the amount of the penalty, without explicitly embodying in the appellate determination specific consideration of how such lower award might affect TVT's prospects for justified recovery of attorney's fees and costs. In that event, TVT could seek clarification from the Circuit Court as to whether any such additional remittitur were meant to reflect recognition of litigation costs as a factor, and propose a remand for the purposes of any adjustment indicated by this consideration. If any such award as further modified does not adequately reflect fees and costs, TVT could petition this Court to reopen this matter so as to examine the litigation costs request in light of the circumstances then prevailing.

consideration in the size of the punitive award, either as assessed by the jury or as remitted. For this reason, the Court is inclined to recognize and grant in part TVT's supplemental application on the basis of the same apportionment described above with regard to TVT's original request.

Having reviewed the documentation TVT has submitted in support of its application, however, the Court is persuaded that some downward adjustment in the lodestar figures and other supplemental fees and costs requested is warranted. The reductions relate to expenses that reflect substantial inefficiencies or seem excessive or inappropriate. The Court agrees with Defendants' observations, for example, that the number of attorneys engaged in TVT's post-trial efforts, a total of 10, appears to be insupportably high, and that certain travel costs and other unrecoverable fees claimed should be substantially discounted or disallowed. The Court, however, rejects Defendants' contentions that certain third-party litigation-related invoices TVT paid directly by that reason alone should be disallowed, and that the costs of electronic research are not recoverable in connection with TVT's application. *See Gonzalez v. Bratton*, 147 F. Supp. 2d 180, 212-13 (S.D.N.Y. 2001), *aff'd*, 48 Fed. Appx. 363 (2d Cir. 2002) (citing cases). Accordingly, to effectuate the decreases and disallowances adopted here, the Court will reduce TVT's lodestar figure by 20 percent, and lower the other expenses claimed also by 20 percent.

Of the $ 494,474.35 TVT requested, $ 125,162.42 represent fees directly related to TVT's motion for attorneys' fees. As part of the apportionment between expenses reasonably attributable to the infringement claim and expenses attributable to the other claims the Court will not reduce that amount by 50 percent, but rather by 25 percent, thus yielding for this purpose a starting base of $ 93,871.82. This determination is grounded on the premise that where litigation entails complicated and interrelated multiple claims, some permitting recovery of legal expenses and others not,

the preparation of an application for attorneys' fees raises unique difficulties that necessarily entail devoting additional effort and resources in parsing out the claims and their respective allocations of costs and in gathering the corresponding supportive documentation pertaining only to the recoverable expenses. However, the Court will reduce the threshold figure by an additional 20 percent to reflect the same sources of inefficiencies or excessive expenditures identified above with regard to the balance of the application. Thus, the allowable costs related to the preparation of TVT's attorneys' fees motion total $ 75,097.75.

Reducing the remaining $ 369,311.93 by 50 percent to account for the Court's apportionment as discussed above yields $ 184,655.97. Applying to this number the further 20 percent to reflect the reductions and disallowances described above produces $ 147,724.78. Adding to this figure the $ 75,097.75 allowed with respect to the preparation of TVT's attorneys' fees application results in a total award of $ 222,822.53 attributable to TVT's post-trial supplemental litigation costs. The Court consequently will authorize entry of an amended judgment in favor of TVT for an additional amount of $ 222,822.53.

ORDER

For the reasons discussed above, it is hereby

ORDERED that the motion of plaintiffs TVT Records and TVT Music, Inc. ("TVT") for an award of attorneys' fees and costs incurred in connection with this action, as set forth in TVT's supplemental request dated September 16, 2003, is granted in part as set forth in this Order; and it is further

ORDERED that the Clerk of Court is authorized to enter an amended judgment in this action in favor of TVT and against Defendants The Island Def Jam Music Group and Lyor Cohen, jointly and severally, in an additional amount of $ 222,822.53 representing post-trial attorneys' fees and costs TVT incurred in prosecuting this action; and it is further

ORDERED that in other respects TVT's motion for attorneys fees and costs is DENIED, without prejudice to TVT's renewal of its motion insofar as appropriate under the circumstances described in the decision above.

SO ORDERED.

TRANSCRIPT EXCERPTS OF HEARING: RULE 50(a) MOTION

(At the sidebar)

MR. ORTNER: Sorry for the delay, your Honor. We move to dismiss under Rule 50 on the following grounds. First, let me take the breach of contract claim which I believe is Count 2.

MR. HAVILAND: If this is going to be lengthy, would it make sense to go into chambers, your Honor?

MR. ORTNER: It's going to be somewhat lengthy.

THE COURT: Are you going to go into details of what your claims are?

MR. ORTNER: Not too much. Let me try it this way, and if your Honor feels we should move, we'll move. Just in summary, in order to prove a breach of contract claim the plaintiff must demonstrate that there was damage. There is no evidence for this jury on damage.

First of all, they point to the August 2002, which is our alleged repudiation letter, as constituting a breach of our contract, our alleged contract with TVT. Assuming arguendo that that was a breach, it did not cause any damage. The testimony of Irv Gotti was uncontradicted, he did not know about that letter, he did not stop working as a result of that letter on the CMC project. He continued working. This is uncontroverted -- uncontradicted --- he continued working on that project in September and October 2002. He explained the reasons why he was upset that he could not include -- because Mr. Gottlieb did not give him permission to -- include three masters that he wanted to include in the Ja Rule album. But he never stopped working. There is no evidence that he stopped working on this.

So, he actually -- all the evidence is that he is continuing to and intends to go forward with completion of the

album, so there is no evidence in the record that our alleged withdrawal of consent in any way contributed to Mr. Gotti not continuing to work. By the way, there is no evidence whatsoever that Ja Rule stopped working. None.

Secondly, it is the burden of plaintiff to show that it has been damaged. Even if the jury disbelieves Mr. Gotti's explanation for the change of the release date, the plaintiff requires affirmative evidence that the August 2002 letter or some other act attributable to defendant, IDJ, caused Gotti and Ja Rule to not perform and, therefore, the withdrawal of our consent caused damage. There is no evidence to support that.

Secondly, even assuming -- this is a new point -- no damage for another reason under the Copyright Act, Section 204.

THE COURT: I think this is going to take longer. Let me send the jury out for ten minutes and we will finish it.

(In open court)

THE COURT: Why don't we take the afternoon break earlier than usual at this point, because this sidebar may take a little longer, and I don't want to keep you waiting. So why don't we take a ten minute break at this point.

(Jury not present)

THE COURT: All right. Mr. Ortner, you may resume.

MR. ORTNER: Your Honor, turning to the second reason why this court should dismiss because of a failure to prove damage attributable to any act constituting breach of contract on the part of Def Jam, I refer the court to 17 U.S.C., Section 204(a), which requires delivery of a signed copyright conveyance before exclusive rights can be conveyed to a grantee. Let me explain the significance of that in the context of this case.

Your Honor has before you Defendant's Exhibit A, which is the Ja Rule agreement under which Ja Rule agrees to furnish his exclusive services to Def Jam.

Section 501(a) read together with Section 1301 made clear that everything that's recorded during the term of Ja Rule's recording agreement belongs exclusively to IDJ. Everything. Regardless of whether the recordings are made for someone else, everything belongs to IDJ, including all copyrights. This is critically important for this reason:

According to the memorandum agreement, the object of this project was to obtain for TVT the exclusive right to distribute the new CMC recordings in the form of an album. Now, a person can enter into an agreement today, providing that anything created after today, anything created in a copyright sense, anything recorded will belong to his or her record company even if the recordings take place in the future, as long as that agreement provides that all recordings recorded during the term belong to the record company. In this case, Ja Rule has an agreement that says everything belongs to Def Jam, everything he records, no matter for whom.

In order for TVT to have accomplished its objective -- which was obtain the right exclusively to get the recordings of the new CMC album and to distribute those exclusively -- TVT needed a conveyance by Def Jam of an exclusive conveyance of copyright entitlement with respect to the songs to be recorded for this CMC album project for TVT.

Now, your Honor is familiar, of course, with the statute of frauds, where even if there is a signed document sufficient to constitute a contract, the failure to deliver that document does not make out the failure to enter into a contract. But the Copyright Act is different. The Copyright Act goes beyond the standard statute of frauds and says under Section 17 U.S.C., 204(a), there not only must be a signa-

ture, there must also be delivery; assuming arguendo, assuming for purposes of this motion that the side letter was sufficient to grant the copyright conveyance to TVT to achieve TVT's objectives to have an exclusive grant, assuming that's the case that had to be delivered.

Therefore, even if you make out a contract, it had to be delivered to TVT. So even if TVT makes out the existence of a contract, arguing that the delivery of a signed document wasn't necessary to establish a contract, the failure to deliver prevented TVT from getting the copyright grant, and in the absence of the copyright grant TVT could not release the CMC album. And if TVT could not release the CMC album, it suffered no damages from our alleged briefs by withdrawing or repudiating an unsigned document.

Let me turn to promissory estoppel. Promissory estoppel requires reasonable reliance on the part of TVT on an alleged oral promise.

On this record, your Honor, this jury cannot find reasonable reliance for several reasons, among others:

One, the parties clearly manifested their intention to have a written signed agreement with everybody signing and returning the signatures. That's number one. It never happened.

Two, given the testimony that the jury has heard about the prior history of threats by Lyor Cohen, the prior conduct of the parties, the on again/off again by Def Jam and Lyor Cohen, no rational jury could determine here that TVT could reasonably rely upon any oral promise.

In addition, even if the jury could make that determination with respect to Def Jam, there is no evidence with respect to Lyor Cohen, who is also named as a defendant, there is no evidence that Mr. Cohen acted outside the scope of his authority. So even if your Honor believed there was a sufficient question to go to the jury with respect to whether

promissory estoppel entitles TVT to assert the existence of a contract, there can be no liability asserted against Mr. Cohen personally, because there is no evidence that his actions were in any way other than acting within the scope of his authority as the chairman of IDJ. Therefore, he should be dismissed if both defendants are not.

Now let me turn to tortious interference. In order for there to be tortious interference, it must be demonstrated that there is evidence to go to the jury that there was a breach by Gotti or Ja Rule which was caused by Def Jam or Cohen. Remember, both of them are defendants in that count. There is no evidence, not a single bit of evidence, that Gotti or Ja Rule stopped performing their contract. I have already summarized that for your Honor and I won't repeat it. But any assertion that anything that was done by Mr. Cohen or Def Jam to induce a breach by Gotti and Ja Rule of their agreement with TVT is purely a matter of speculation. There is no evidence to support it. There is no evidence of interference. There is no evidence of any threats. There is nothing in the record.

In addition, if your Honor was inclined to allow the jury to hear that claim with respect to Def Jam, there is no evidence that Lyor Cohen was acting outside the scope of his authority and was acting in any capacity other than as the chairman of IDJ.

Fraud: The fraud claim is nothing more than an effort to get around the fact that there was no breach of contract. It's dressing up a breach of contract claim in an aggravated description of what went on here. They are trying to circumvent the law of contract and impose fraud liability when there is no contract.

First, there is no evidence of scienter. There is no evidence that Cohen or IDJ intended to defraud TVT. Not a scintilla of evidence. We said yes, we said no. That's not

fraud. That's waffling, but it's not fraud. Fraud means and needs more.

There is no evidence, your Honor, of any reasonable reliance by TVT on any promise or any silence. Not a single bit of evidence in the fraud context. It was patently unreasonable, given the prior history of the parties, Cohen's threats in the past, as alleged by Mr. Gottlieb, the way TVT does business in terms of its contracts have to be signed before its bound or it pays, and Cohen's extreme reluctance, as the jury sees both from the testimony from Mr. Cohen and other witnesses from IDJ, but also the testimony of Mr. Gottlieb, it was patently unreasonable to rely upon any oral promises. There is no demonstration of any reliance. There is no demonstration that there was any material misrepresentation in anything that was said, no intent to defraud.

Now, even if your Honor believes there is a sufficient basis to go to the jury on a fraud claim against Def Jam, I again say to you that Lyor Cohen was acting within the scope of his authority. There is not a single bit of evidence to demonstrate that Mr. Cohen in any way acted other than in his capacity as the chairman of IDJ. Therefore, any claim of fraud against Lyor Cohen must be dismissed as a matter of law.

Let me now turn to the copyright claims. First, let me turn to "Get the Fortune." There is no basis to go to this jury on an assertion that there was anything other than a valid, fully enforceable license agreement. They claim fraud. There is no evidence of fraudulent representations or omissions by any representative of Def Jam with respect to the "Get the Fortune" license. There is no evidence of any communication by Mr. Gottlieb to Def Jam. He operates on assumptions that people understand what is in his mind. No evidence to indicate any material representation or material omission on the part of Def Jam. It was the secret intent of

Mr. Gottlieb unexpressed. That doesn't subject our license to a claim that it was vitiated by fraud.

There may be disappointment on the part of Mr. Gotti that his expectation that there would be this album on his schedule failed to materialize. That is not fraud. And there is no evidence at all in any portion of this record indicating that Lyor Cohen in any way was involved with that alleged fraud, or in connection with the licensing, or in connection with anything to do with "Get the Fortune" and the incorporation of "Get the Fortune" into the "Irv Gotti Presents" project.

Second, "The Rain". There was oral consent to Gotti. That's the admitted testimony of Mr. Gottlieb. Oral consent equals a nonexclusive license as a matter of law. There is no basis for this jury to take the position or to find that there was no license to Def Jam.

Mr. Gottlieb admitted that he knew when giving oral consent to Mr. Gotti to use "The Rain" in the CD that it was for the purposes of incorporation in the "Irv Gotti Presents the Inc." CD. He also testified today that he knew that Def Jam was the distributor of that CD. Therefore, all that can be said here is that there was an intent on the part of TVT to give consent to Irv Gotti for the benefit of Def Jam to distribute, and Def Jam is entitled to rely upon that license. Therefore, there can be no copyright infringement claim.

There is also no evidence of fraud in procuring that license for the same reasons that I described before with respect to "Get the Fortune." And fundamentally there is no evidence at all that Lyor Cohen played any role with respect to this project, including obtaining the license for "The Rain". No claim of fraud relating to Cohen.

Even if your Honor believes that there is a question for the jury with respect to whether the oral consent was enforceable or was vitiated by this alleged fraud -- and I assert to your Honor that there is no basis for your Honor to

find fraud there and to vitiate that license -- there isn't a drop of evidence relating to Lyor Cohen, and he must be dismissed.

In fact, Judge, it's very clear that these claims against Lyor Cohen are simply harassment, and they should be viewed as exactly what they are. There is either a contract here or there is no contract. If there is a contract and if Def Jam breached it and caused damage, that doesn't add up to any liability for Lyor Cohen. But all these theories, all these claims are asserted for one reason, which is to sweep Mr. Cohen into what is really a breach of contract claim and seek to impose liability on him when there is no evidence to support any assertion or any finding that Mr. Cohen acted in any way other than strictly in his capacity as the chairman of Def Jam at all times.

Finally, your Honor, the only claim that TVT Music can assert in this case is the assertion with respect to the "Get the Fortune" claim, because that relates to the utilization of a song, a license for the song, musical composition "Get the Fortune." TVT Music has no standing to assert any contract claims or any other claims in this case, and I respectfully request that your Honor dismiss all claims brought by TVT Music. Even if your Honor keeps alive any claim by TVT Music with respect to "Get the Fortune", TVT is not a plaintiff or a proper plaintiff with respect to any other claims. Thank you.

THE COURT: Thank you. Mr. Haviland.

MR. HAVILAND: Well, your Honor, I am reluctant to go through all of these claims in light of the fact that these are all the subject of matters that have been discussed with respect to jury instructions that are pending, but I will briefly respond if the court is really going to consider this motion.

With respect to the breach of contract claim, we have presented evidence of the formation of a contract. Certainly

Mr. Gottlieb has testified that there was an agreement between himself and Mr. Cohen.

With respect to the claim that there is an absence of damage resulting from IDJ's breach, the August 2002 letter, there is evidence it was copied to Mr. Gotti and to his lawyer Mr. Branca. The jury could reasonably assume that they were on notice of that and acted accordingly by ceasing to perform work in support of the CMC album.

The evidence in the record that exists is that after at least August of 2002 Mr. Gotti's only work with respect to the CMC album was to remove CMC recordings from "The Last Temptation" album and rerecord it in order to facilitate the release of "The Last Temptation" album.

So, we believe that we have established at least evidence that the jury can consider with respect to the formation of a contract and damage.

With respect to the 17 U.S.C., Section 204(a) claim that Mr. Ortner raises, this claim is not a new position. It was one that was raised in briefing surrounding the preliminary injunction. And a jury can certainly reasonably conclude, A, by reviewing the Ja Rule exclusive services contract with Def Jam, if it is so inclined, that the recordings at issue there are recordings which are made for Island Def Jam and do not prevent the use of Mr. Rule's services pursuant to a separate legitimate contract, such as the heads of agreement, which we have presented evidence was both executed by Mr. Rule and approved by Island Def Jam.

Furthermore, we have raised in our previous briefing that this issue was a red herring because the conveyance that Mr. Ortner makes reference to would be a conveyance which would occur at the time, prior to the existence of any of the recordings at issue. All of the CMC recordings at issue were made after the execution of the head of agreement and the consent by Def Jam, and so there was no copyright to be conveyed pursuant to the side letter agreement.

With respect to reasonable reliance, the evidence is not that there was any intention by Mr. Cohen or Mr. Gottlieb to condition the performance of the contract on what Mr. Ortner refers to as fully executed agreements and their delivery.

He has also suggested that no rational jury could conclude that Mr. Gottlieb could reasonably rely on assurances from Mr. Cohen in light of Mr. Cohen's threats. However, it is the testimony of Mr. Gottlieb that subsequent to a strenuous negotiation -- of which there is ample evidence in the record not only between Mr. Gottlieb and Mr. Cohen, but also between Mr. Gotti and Mr. Cohen, in which there were heated words during negotiations -- that ultimately an agreement was reached.

With respect to the tortious interference claim -- excuse me, your Honor. Mr. Ortner raises that with respect to the promissory estoppel claim that no reasonable reliance is possible and also that Lyor Cohen, that there was no evidence that he acted outside the scope of his authority or had any intent to act outside the scope of his authority. However, the very threats that Mr. Ortner makes reference to suggest a personal animus by Mr. Cohen against Mr. Gottlieb, a threat to blackball him in the industry, reference to prior negative experiences in which Mr. Cohen felt specifically ill will towards Mr. Gottlieb, from which a reasonable jury could conclude that Mr. Cohen was acting not purely in the interests of Island Def Jam or in his capacity as a corporate officer but in order to carry out his expressed desire to blackball Mr. Gottlieb.

With respect to the tortious interference claim caused by Island Def Jam, we have presented substantial evidence that at the time of Mr. Gotti's scheduled release of the CMC album there were substantial incentives provided by Island Def Jam to cause those CMC recordings not to be delivered to TVT but instead to be delivered to Island Def

Jam Music group. And part of that incentive was the negotiation of a fourth album amendment with Ja Rule in which both Mr. Gotti through Top Dawg and Ja Rule would benefit with substantial receipt of a deal worth in the range of $8 million.

A jury can certainly conclude that those incentives, in combination with the express language of the August 5, 2002 approval memo, which indicated Island Def Jam's knowledge of the contract, desire to interfere with the contract, and a plan which was in fact carried out to prevent the actual delivery of the recordings to TVT was effective, and they are free to conclude from the objective evidence, irrespective of Mr. Gotti's testimony, that Mr. Gotti was in fact motivated by those circumstances.

The jury is also free to conclude, based on the evidence presented, that Mr. Gotti's testimony as to his particular motivations may not be credible.

I point out that with respect to Mr. Cohen's personal involvement in the tortious interference claim, Mr. Ortner, as he knows, misstates the standard. There is no requirement that Mr. Cohen be shown to be acting ultra vires. A corporate officer may be held liable for tortious interference even if acting within the scope of his authority as a corporate officer.

With respect to fraud, your Honor, I believe that this case fundamentally is a case about fraud, and I believe that the fraud is principally perpetrated by Mr. Cohen personally.

We observed his testimony here in which he repeatedly perjured himself on the stand and in which he made clear by his own declaration that he was in the process of negotiating an agreement with TVT, without ever having the intention to perform it.

He caused TVT to rely on such performance through a variety of meetings which are well established in the re-

cord. It's clear that TVT did rely by its performance under the agreement. And Mr. Cohen intentionally withheld and concealed his intent not to permit this to go forward over a long period of time.

Once again, Mr. Cohen need not for purposes of that consent of that claim be deemed to be acting out ultra vires but can be acting as a corporate officer and still be liable for fraud, as the court well knows.

With respect to the copyright claims, our position with respect to copyright has been clear all along. We have contended, and I believe that we have shown that following August of 2001 -- in which the consent to this agreement was given by IDJ -- IDJ repeatedly ratified that consent by its failure to at any time object to the knowledge that Irv Gotti, Ja Rule and others were proceeding with the CMC recordings.

There is in the record now an e-mail which includes a reference by Mr. Kempler that he was aware at the time that the license agreement was being discussed between IDJ and TVT, that he himself had an expectation that that license would be issued in part on the basis of the CMC album proceeding with TVT.

So, there was a continuing fraud by concealment by IDJ continuously from the period of time commencing with the agreement which was entered into and continuing through the granting of these licenses, which Mr. Gottlieb has stated unequivocally would not have been granted but for the understanding that these materials, these copyrighted materials, would be used in furtherance of a CMC album which IDJ in fact never intended to permit to go forward.

So, our view is that a jury can and will reasonably conclude that TVT reasonably relied upon the assurances which were continuous, that it would be able to proceed with this CMC project, that it set up the CMC project through

the "Irv Gotti Presents the Inc." releases, and that it only granted these on a fraudulent condition.

With respect to Lyor Cohen, once again Lyor Cohen as chairman of Def Jam was at all times in a position to control and to financially benefit from the commercial exploitation of these materials on the "Irv Gotti Presents" DVD and CD. He was in fact copied on the license request along with Mr. Kempler, and a jury can reasonably conclude that having been copied on such communication he was aware of it and in a position to stop it.

With respect to TVT Music, the simplest response is that TVT Music, as has been established, is a subsidiary company of TVT Records. Through the heads of agreement, TVT would have had rights and commercial benefit both from the exploitation of the sound recordings and from the publishing of those materials in which TVT Music had a financial interest. And so all of the claims related to the commercial exploitation of the CMC recordings are claims to which TVT Music has an interest in standing and so it should not be dismissed.

THE COURT: Thank you. Mr. Ortner, I am not going to allow any more argument. We have kept the jury waiting substantially.

MR. ORTNER: Can I have one minute?

THE COURT: I am going to defer judgment on all the claims until after the jury verdict is in. At that point we will see that the jury does, and I will rule on the motion at that point. All right?

MR. HAVILAND: Thank you, your Honor.

THE COURT: Bring the jury in.

MR. MERVIS: Before we do that, just as a matter of housekeeping, our first presentation to this jury is going to be the reading of some deposition transcript from the deposition of Miss Savcic, and Miss Miller will play the witness, and in order so the jury is not confused, perhaps the

court would consider a brief instruction or an explanation to the jury as to what is being done.

THE COURT: All right. You are going to bring the jury in? Let me remind the parties again about the importance of getting your draft jury instructions by the close of business. Close of business of the court is not close of business for counsel. 5 o'clock. So we're able to work on it overnight and have matters ready by the morning. I am talking about the verdict sheet.

MR. HAVILAND: Your Honor, I can say for plaintiffs that we are not going to be in a position to present the proposed verdict sheet by 5 o'clock today. I would think that we could have something to the court by not later than 8 o'clock.

THE COURT: Mr. Mervis?

MR. MERVIS: I would think that we would also be in a position to have something by 8 o'clock. What might not be possible would be a meaningful meet and confer with opposing counsel at that time, but we can certainly try to meet and confer after the submission to the court.

MR. HAVILAND: Alternatively, we might be able to present a joint submission which would be faxed late in the evening or early tomorrow morning.

THE COURT: The difficulty is that if we are not ready by tomorrow, the court is going to have to hold this jury one more day. All right. Let's bring the jury in.